BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

GERARDO TREJO	)	
Claimant	)	
VS.	)	
	)	Docket No. 186,140
NATIONAL BEEF PACKING	)	
Respondent	)	
AND	)	
	)	
WAUSAU UNDERWRITERS	)	
Insurance Carrier	)	

ORDER

On October 17, 1996, the application of claimant for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge Jon L. Frobish on May 8, 1996, came on for oral argument.

APPEARANCES

Claimant appeared by his attorney, Lawrence M. Gurney of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Shirla McQueen appearing for Kerry McQueen of Liberal, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board.

At oral argument, the parties agreed that average weekly wage was not at issue. It was also agreed that the $340.30 average weekly wage stipulated by the parties would

be effective for the period March 16, 1995, through March 16, 1997. At that time, claimant's average weekly wage will increase by $54.22 to $394.52 as on that date claimant's benefit package will cease to be provided by respondent.

ISSUES

What is the nature and extent of claimant's injury and/or disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary file herein, and, in addition, the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant began working for respondent on May 9, 1991. In October 1993, while working in respondent's offal department, claimant suffered accidental injury to his low back. Claimant was referred to a series of doctors including Jack Reese, M.D., A. C. Lisle, Jr., M.D., John H. Gilbert, M.D., George Fluter, M.D., James R. Hay, M.D., and C. Reiff Brown, M.D. Claimant underwent treatments including injections in his back. Claimant's primary treating physician during this time was Dr. Fluter. Dr. Fluter gave claimant work restrictions which the respondent was unable to meet. Claimant's last day worked with respondent was March 8, 1995 and claimant alleges entitlement to a work disability subsequent to that date. Respondent contends claimant is not entitled to a work disability having been offered a position on or about January 22, 1996, based upon the restrictions placed upon claimant by Dr. Brown. Respondent cites Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995) in support of its position.

In Foulk, the Kansas Court of Appeals was asked to interpret K.S.A. 1988 Supp. 44-510e(a) which stated in relevant part:

> "permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn a comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than percentage of functional impairment. . . ."

In denying the claimant work disability, the Court of Appeals, in Foulk, focused on the fact that a specific job offer had been made to the claimant within claimant's restrictions. Claimant had refused to even attempt the job even though it was within claimant's restrictions. The Court of Appeals, in denying claimant an award for work disability, found that:

> "The legislature clearly intended for a worker not to receive compensation where the worker was still capable of earning nearly the same wage. Further, it would be unreasonable for this court to conclude that the legislature intended to encourage workers to merely sit at home, refuse to work, and take advantage of the workers compensation system."

To construe K.S.A. 1988 Supp. 44-510e(a) as claimant suggests would be to reward workers for their refusal to accept a position within their capabilities and at a comparable wage.

It is acknowledged that the definition of work disability contained in K.S.A. 44-510e has changed. The "new act" defines permanent partial general disability as follows:

> "The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, average together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . ."

In applying the Foulk logic to the current case, the Administrative Law Judge found that the public policy stated by the Court of Appeals in Foulk was applicable not withstanding the change in the work disability definition of K.S.A. 44-510e(a). The Appeals Board acknowledges that this public policy would appropriately be applied to a claimant refusing work within his restrictions. However, it is noted that the restrictions placed upon claimant by Dr. Fluter did not allow claimant to return to work with respondent as respondent was unable to accommodate those restrictions. Until claimant was examined by Dr. Brown and Dr. Brown's report issued in January 1996, no offer of employment was presented to claimant.

As such, the Appeals Board finds that prior to the January 22, 1996, offer, claimant is entitled under K.S.A. 44-510e(a) to a work disability. In considering the evidence available, the Appeals Board must average both the percentage of work tasks the employee has lost the ability to perform in the opinion of the physician, with the difference between claimant's average weekly wage at the time of the injury and the average weekly wage the claimant is earning after the injury. The only physician providing an opinion regarding claimant's task loss is Dr. Fluter. Based upon the report of Jerry Hardin, Dr. Fluter felt claimant had suffered an 88 percent loss of task performing abilities. It is also noted that claimant was not employed during this period of time and no job was offered to claimant. As such, the Appeals Board finds for the period subsequent to March 8, 1995, that claimant is entitled to a loss of task performing abilities of 88 percent and a

wage loss differential of 100 percent. As the statute requires an averaging of the two numbers, the Appeals Board finds claimant is entitled to a 94 percent permanent partial work disability for the period March 8, 1995, through January 21, 1996.

Claimant was referred by respondent to Dr. Brown for an examination and treatment. It is significant that both Dr. Fluter and Dr. Brown provided treatment to claimant, neither being merely an evaluating physician. Dr. Brown had the benefit of reviewing an MRI performed on claimant at Dr. Brown's request in July 1995. This MRI was not available to Dr. Fluter. It is also noted that Dr. Fluter's restrictions were hinged in part upon functional capacity evaluations performed on claimant which Dr. Fluter described as being suspect. It appears as though the physical therapist performing the FCE did not feel claimant provided maximum effort. Dr. Fluter used what he considered to be the most reliable of the questionable functional capacity evaluations in reaching his recommendations for claimant's restrictions. As Dr. Brown had benefit of the MRI in placing restrictions on claimant, the Appeals Board finds the subsequent report of Dr. Brown to be a more accurate depiction of claimant's actual abilities.

Claimant argues the most recent evaluation by Dr. Brown should not be considered as the most accurate. As a general policy this would allow, in workers compensation cases, the latest medical doctor to control the restrictions regardless of the accuracy of the doctor's opinion. The Appeals Board does not find, as a matter of policy, that the most recent medical report is the most accurate. However, in this case Dr. Brown did have additional test results available to him upon which to base his opinion regarding what, if any, restrictions should apply to claimant. As such, the Appeals Board finds the restrictions of Dr. Brown, placed upon claimant in January 1996, to be accurate and appropriate.

Respondent in its letter of January 22, 1996, offered claimant employment within the restrictions placed upon claimant by Dr. Brown. Claimant refused to attempt this offered employment. In refusing to even attempt employment within the restrictions of the then treating physician, claimant, in the opinion of the Appeals Board, has violated the policy set forth in Foulk. Claimant appeared to be trying to take advantage of the workers compensation system. In following the philosophy of the Court of Appeals in Foulk, the Appeals Board finds as of January 22, 1996, claimant's entitlement to a work disability ceased. As of that date, the Appeals Board finds that claimant is entitled to a 3 percent permanent partial functional disability.

In reviewing the evidence in the record, it is noted claimant was provided two weeks temporary total disability compensation subsequent to his layoff on March 8, 1995. These two weeks of temporary total disability compensation will be taken into consideration by the Appeals Board in calculating claimant's award.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Jon L. Frobish dated May 8, 1996, should be, and is hereby modified and the claimant, Gerardo Trejo, is granted an award against respondent, National Beef Packing, and its insurance carrier, Wausau Underwriters, for an injury occurring on or about October 25, 1993. The Appeals Board notes claimant's award of temporary total disability compensation was at the rate of $228.88. Based upon an average weekly wage of $340.30 the actual rate should be $226.88 per week.

Claimant is entitled to 5.86 weeks temporary total disability compensation at the rate of $226.88 per week in the amount of $1,329.52 followed by 12.45 weeks permanent partial disability at the rate of $226.88 per week in the amount of $2,824.66 for a 3% permanent partial functional disability through claimant's termination of employment on March 8, 1995. Thereafter, claimant is entitled to 43.71 weeks permanent partial general body disability at the rate of $226.88 per week in the amount of $9,916.92 for a total award of $14,071.10 all of which is due and owing in one lump sum minus amounts previously paid.

Pursuant to K.S.A. 44-536, claimant's contract of employment with his counsel is approved insofar as it does not contravene the requirements of the statute.

The fees necessary to defray the expenses of the administration of the Workers Compensation Act are hereby assessed against the respondent and its insurance carrier to be paid as follows:

Underwood & Shane	
Transcript of Regular Hearing	$ 81.50
Deposition of C. Reiff Brown, M.D.	$205.50
Susan Maier	
Deposition of Gerardo Trejo	$ 95.62
Barber & Assoc.	
Deposition of Karen Crist Terrill	$161.80
Bannon & Assoc.	
Deposition of George Fluter, M.D.	$208.84

IT IS SO ORDERED.

Dated this ____ day of November 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Lawrence M. Gurney, Wichita, KS
Kerry McQueen, Liberal, KS
Kenneth S. Johnson, Administrative Law Judge
Philip S. Harness, Director